Supreme Court of the United States

OCTOBER TERM, 1969

No. 249

CLEMON BARLOW, ET AL.,

Petitioners,

—v.—

B. L. COLLINS, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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"DOCKET ENTRIES"

December 2, 1966	Complaint, Motion for Preliminary Injunction filed
December 5, 1966	Summons issued with Complaint and Motion for Preliminary Injunction
*December 21, 1966	Motion to Dismiss, filed by defendant J.A. Minter, Jr., dba J.A. Minter and Son, with Demand for Oral Argument
*(don't know date)	Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction filed
February 1, 1967	Motion to Dismiss Complaint as to defendants Collins, Godfrey and Freeman filed with Memorandum in Support of Motion to Dismiss as to these defendants
*February 14, 1967	Plaintiffs' Memorandum in Opposition to Motion to Dismiss of defendant Minter filed
February 20, 1967	Plaintiffs' Memorandum in Opposition to Motion to Dismiss of defendants Freeman, *et al.* filed
February 21, 1967	ORDER entered denying defendant Minter's Motion to Dismiss and directing that the cause as between plaintiffs and Minter proceed to pretrial but GRANTING Motion to Dismiss of defendants Collins, Godfrey and Freeman in their official capacities
February 23, 1967	ORDER entered transferring case to Northern Division of Southern District of Alabama
*March 2, 1967	Answer of defendant Minter filed
April 14, 1967	Motion for Clarification of Order entered February 21, 1967 filed by plaintiffs with Memorandum in Support of Motion, and Proposed Order Attached

April	26, 1967	Notice of Appeal filed by plaintiffs from that part of the ORDER entered on February 21, 1967 granting Motion to Dismiss of defendants Collins, Godfrey and Freeman
May	1, 1967	$250.00 deposited by plaintiffs as cash bond on appeal
May	24, 1968	Argument and Submission in the Court of Appeals for the Fifth Circuit
July	16, 1968	OPINION issued by the Fifth Circuit Court of Appeals and Judgment Entered

*Omitted by stipulation

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2494-N

CLEMON BARLOW, SINNIE BLOCTON, WALTER BLOCTON, ARTHUR BROWN, WILLIE GILCREST, ELIJAH GREEN, OTIS HALE, WILL MOORER and WILL WILLIAMS, on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

J. A. MINTER, JR., doing business as J. A. Minter and Son; B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, as Administer of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture, DEFENDANTS

COMPLAINT—Filed December 2, 1966

1. This is a civil action brought by Plaintiffs:

(a) To declare Title 7—Agriculture, Chapter VII —A.S.C.S., Subchapter A, Part 709 et seq., Assignment of Payment, 31 Federal Register 2815, F.R. Doc. 66-1689, filed February 16, 1966, ("Assignment Regulation") invalid and unauthorized by law on the grounds that said regulation is in excess of statutory authority of the Food and Agriculture Act of 1965 and to enjoin the utilization of the Assignment Regulation;

(b) To enter judgment against Defendant J. A. MINTER, JR., doing business as J. A. Minter and Son ("MINTER") for moneys paid by the United States Department of Agriculture-Agricultural Stabilization and Conservation Service for subsidy payments which would have been paid to Plaintiffs had not Defendant MINTER illegally barred them from working the land on his plantation;

(c) To enjoin and restrain Defendant MINTER from removing certain Plaintiffs from their homes on the Minter plantation and compelling Defendant MINTER to negotiate leases with these Plaintiffs for the year 1967.

2. The jurisdiction of this Court arises under the Constitution of the United States and, in particular, Article III and the First, Fifth and Fourteenth Amendments thereto, and under the laws of the United States and, in particular, Title 28 U.S.C. Sections 1331, 1337, 1343, 1346, 1361, 2201 and 2202, Title 42 U.S.C. Sections 1981 *et seq.* and the Civil Rights Act of 1964. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

3. (a) Plaintiffs are citizens of the State of Alabama, County of Dallas, and are or were tenant farmers on the plantation owned by Defendant MINTER. Plaintiffs have been tenant farmers on this land from eleven to sixty-one years, and Plaintiffs W. BLOCTON and WILLIAMS have been on this land all their lives.

(b) Plaintiffs represent the class of Negro tenant farmers in Dallas County, the State of Alabama and the South who are victimized by the utilization of the Assignment Regulation. This class is so numerous as to make joinder impracticable. There are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class and the representative parties fairly and adequately protect the interests of the class.

4. (a) Defendant COLLINS is the State Director of the Alabama Agricultural Stabilization and Conservation Service ("A.S.C.S."), which maintains its office in Montgomery, Alabama. Upon information and belief, Defendant COLLINS resides in Montgomery, Alabama.

(b) Defendant GODFREY is the Administrator of A.S.C.S., which operates within and is responsible to the United States Department of Agriculture.

(c) Defendant FREEMAN is the Secretary of the United States Department of Agriculture and is authorized by law to promulgate regulations, *inter alia*, for the

administration of the Food and Agriculture Act of 1965, and did promulgate the Assignment Regulation. Both Defendants GODFREY and COLLINS are responsible in part for enforcing regulations promulgated by Defendant FREEMAN, including the Assignment Regulation.

(d) Defendant MINTER is a wealthy plantation owner who leases or has leased land to Plaintiffs and many other Negro tenant farmers. The Minter plantation is located at Tyler, Alabama.

FIRST CLAIM AGAINST DEFENDANTS COLLINS, GODFREY AND FREEMAN

5. On or about the 3rd day of November, 1965, the President of the United States signed into law the Food and Agriculture Act of 1965 which provided federal subsidy payments for landowners, tenant farmers and sharecroppers, *inter alia*, for voluntarily reducing the amount of cotton produced. These payments were payable, upon request, *one-half in advance* upon signing for the program, pursuant to Chapter VII A.S.C.S., subchapter B, Part 722, 1966 Upland Cotton Program, Section 722.813, 31 Federal Register 4884, filed March 23, 1966.

6. (a) The said Act also provided for assignment of the benefits under this program as follows:

> "Section 402 . . . (13) The provisions of subsection 8(g) of the Soil Conservation and Domestic Allotment Act, as amended (relating to assignment of payments) shall also apply to payments under this subsection."

(b) Section 8 (g) of the Soil Conservation and Domestic Allotment Act, as amended, provides, *inter alia*:

> "A payment which may be made to a farmer under this section, may be assigned, without discount by him in writing *as security for cash* or advances *to* FINANCE MAKING A CROP . . ." (Emphasis supplied)

(c) Chapter XI, Agricultural Conservation Program Service, Part 1110 *et seq.*, Assignment of Payment,

20 Federal Register 6511, September 3, *1955* evinced the intent of the legislature by providing, in part, as follows:

> "Sec. 1110.2 *Payment may be assigned to finance making a crop.* A payment which may be made to a farmer (hereinafter referred to as the 'assignor') under Section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. *Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.*" (Emphasis supplied)

7. In February 1966 the assignment regulations were amended by Defendant FREEMAN to permit *the assignment of payments for cash rent.* Section 709.2 of the regulations was amended by changing the second and third sentences thereof to read as follows:

> "To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor *and the payment of cash rent for land use therefor;* (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm." 31 F.R. 2815 (Feb. 17, 1966). (Emphasis supplied.)

8. Plaintiffs submit that the Assignment Regulation is invalid and unauthorized by law in that it exceeds the statutory authority in that Section 8 (g) permits the assignment only "as security for cash or advances to finance making a crop." The congressional authority which must be the basis of the Defendant's authority does not permit a regulation to permit the *assignment of payment for cash rent* which in no way "finance[s] making a crop."

9. (a) The Plaintiffs herein and those similarly situated as tenant farmers on the land of Defendant MINTER were each year required to execute a rent note as security for the cash rent of this land. The note operated as a lien on the crop and farm equipment owned by Plaintiffs until the rent note was paid. In the interim, Defendant MINTER would provide Plaintiffs with:

(1) a certain amount of cash for expenses, e.g., $10.00 a month (which was repaid with interest out of the income for the crop);

(2) credit in Defendant MINTER's local store for groceries and supplies to "make a crop" at generally excessive prices (also repaid *with interest*); and

(3) an uninhabitable shack to live in.

(b) The Plaintiffs and those similarly situated had no choice but to make all purchases from Defendant MINTER since they had no other credit and no income from previous years. At the end of the season, the rent and the debt to Defendant MINTER would leave no profit (after minimal living expenses) and the cycle would repeat itself.

(c) The Food and Agriculture Act of 1965 was designed to change this legalized "involuntary servitude" by providing for advance payments as hereinbefore set forth. These would permit Plaintiffs and those similarly situated to avoid Defendant MINTER's interest rates and excess profits and permit, on the other hand, cooperatives where Plaintiffs could purchase their requirements at wholesale, permitting them some return at the end of the year's labors.

10. (a) The Assignment Regulation provided Defendant MINTER with the opportunity to demand that Plaintiffs and all those similarly situated assign the aforesaid benefits in advance as a condition to obtaining a lease to work the land.

(b) Plaintiffs BARLOW, S. BLOCTON, HALE and WILLIAMS and those similarly situated refused to sign and were denied the right to work the land.

(c) Plaintiffs BROWN, W. BLOCTON and GILCREST and those similarly situated did sign the assignments and have lost the benefits as hereinbefore set forth.

11. Plaintiffs show that this is a proceeding wherein they seek a declaration of their rights pursuant to Title 28 U.S.C. Section 2201 and an injunction restraining the utilization of the Assignment Regulation. There is between the parties an actual controversy as hereinbefore set forth. The Plaintiffs and others similarly situated and affected on whose behalf this suit is brought are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of.

12. Plaintiffs have no plain, adequate to complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights. Any other remedy to which Plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the Plaintiffs and those similarly situated

SECOND CLAIM ON BEHALF OF PLAINTIFFS BARLOW, S. BLOCTON, HALE AND WILLIAMS AGAINST DEFENDANT MINTER

13. Plaintiffs repeat and reallege the First Claim with the same force and effect as if fully set forth herein.

14. In or about May of 1966, Defendant MINTER denied Plaintiffs BARLOW, S. BLOCTON, HALE and WILLIAMS the opportunity to work land on his plantation in order to deprive these Plaintiffs of their rights

under the Food and Agriculture Act of 1965 to receive subsidy payments and particularly advance subsidy payments. Defendant MINTER's actions were illegal and for the sole purpose of depriving Plaintiffs of the above benefits and to obtain said benefits for himself in that:

(a) The Assignment Regulation is illegal and invalid;

(b) The Assignment Regulation, even if valid, gave no right to Defendant MINTER or any other plantation owner to compel Plaintiffs to assign; it merely permitted assignment by the tenant farmer if he so chose;

(c) Defendant MINTER did not require extra security (the Assignment) to guarantee payment of his cash rent for the leasehold, since the rent note creating a lien on the cotton crop in itself was sufficient to cover the rent owed and in fact exceeded the rent.

15. At all times hereinbefore mentioned, Defendant MINTER acted to deprive these Plaintiffs of their rights to receive advance subsidy payments with which they would form cooperatives to buy food at wholesale and reasonable prices in lieu of the excessive prices demanded by Defendant MINTER of those captive consumers with no funds to purchase elsewhere. Upon failure to sign, Defendant MINTER was able to obtain the subsidy payments for himself as compensation for inability to receive his excessive profits at his store.

16. Upon information and belief, Defendant MINTER received the subsidy payments which otherwise would have inured to the benefit of these Plaintiffs by hiring day laborers (who receive no subsidy payments under the Food and Agriculture Act of 1965) to work the land previously worked by these Plaintiffs.

17. Plaintiffs BARLOW, S. BLOCTON, HALE and WILLIAMS and those similarly situated were damaged by Defendant MINTER as to the amount of the subsidy payments paid to Defendant MINTER under the Food and Agriculture Act of 1965 for the land previously worked by these Plaintiffs.

THIRD CLAIM ON BEHALF OF PLAINTIFFS BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN AND MOORER AGAINST DEFENDANT MINTER

18. Plaintiffs repeat and reallege the First Claim with the same force and effect as if fully set forth herein.

19. (a) Plaintiffs BARLOW, W. BLOCTON, BROWN and GILCREST are four of the six Plaintiffs who brought suit in the District Court of the District of Columbia in a case styled *Brown et al.* v. *U.S.A. et al.*, Civil Action No. 2259-66, to, *inter alia*, declare invalid and enjoin the utilization of the Assignment Regulation. This suit, which specifically names Defendant MINTER as one who had abused the utilization of said regulation, was discontinued prior to the filing of this suit.

(b) Plaintiffs BARLOW, S. BLOCTON and MOORER defied Defendant MINTER by refusing to sign the Assignment Regulation. Plaintiff MOORER obtained a loan to pay the cash rent.

(c) Plaintiffs BARLOW, BROWN, GREEN and one Pearl Moorer, wife of Plaintiff MOORER, traveled to Washington, D. C. to testify as witnesses in a case styled *Williams et al.* v. *Freeman et al.*, Civil Action No. 1991-66, which sought, *inter alia*, to reform the A.S.C.S. voting regulations and did result in delaying the date scheduled for the holding of said elections in Dallas County as well as the entire State of Alabama. Plaintiff W. BLOCTON submitted an affidavit which was offered in evidence for that same case.

(d) Plaintiff W. BLOCTON was a candidate for Community Committeeman in the 1966 A.S.C.S. elections, which affect the determination of who shall administer the cotton and other A.S.C.S. programs in Dallas County. On or about November 16, 1966, Plaintiff W. BLOCTON was told by Defendant MINTER that he and others would not be permitted to remain on the land because Plaintiff W. BLOCTON and others had participated in the *Brown et al.* v. *U.S.A. et al.* lawsuit.

20. Plaintiffs BARLOW and S. BLOCTON, who did not have leases, were ordered to "vacte by December 1, 1966." Plaintiffs W. BLOCTON, BROWN, GILCREST,

GREEN and MOORER were advised that their leases would not be renewed and would terminate on December 31, 1966.

21. All Plaintiffs are being denied by Defendant MINTER of the right to live on and work the land on the plantation of Defendant MINTER to punish and deter them from exercising their rights to participate in litigation involving the cotton program; to intimidate witnesses who traveled to Washington, D. C. to testify in the litigation involving the cotton program; and to punish and deter those who participated in and were candidates for A.S.C.S. office.

22. Upon information and belief, Defendant MINTER will utilize the provisions of Code of Ala. Tit. 31, Secs. 35 *et seq.* to recover alleged "Possession Wrongfully Withheld" by obtaining "a writ or process directed to the Sheriff or his Deputy or any lawful constable in the County where the land lies" to remove Plaintiffs from the land.

23. At all times hereinbefore mentioned Defendant MINTER acted and will act under color of the statutes, ordinances, customs, regulations or usage of Dallas County and the State of Alabama.

24. The actions of Defendant MINTER hereinbefore described deprive and will deprive Plaintiffs and those similarly situated of their rights, privileges and immunities secured by the Constitution of the United States, specifically their rights under Article III, the First, Fifth and Fourteenth Amendments thereto, and the laws of the United States, including the Civil Rights Act of 1964.

25. These Plaintiffs sue on their own behalf of all other similarly situated Negro tenant farmers and sharecroppers who are being removed from their land to punish and intimidate them from participating in litigation and seeking office in connection with the cotton program of the United States Department of Agriculture. This class is so numerous as to make joinder impracticable. There are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class and the representative parties fairly and adequately protect the interests of the class.

26. Plaintiffs show that this is a proceeding wherein they seek an injunction restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert with him from taking any action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER from their homes on the Minter plantation until the hearing and determination of the prayer for permanent relief. There is between the parties an actual controversy as hereinbefore set forth. The Plaintiffs and others similarly situated and affected on whose behalf this suit is brought are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of.

27. Plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for injunction. Any other remedy to which Plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the Plaintiffs and those similarly situated.

WHEREFORE, Plaintiffs on behalf of themselves and those they represent and all others similarly situated pray that this Court:

a. Assume jurisdiction in this matter;

b. Enter judgment declaring that:

the Assignment Regulation is invalid and unauthorized by law on the grounds that it is in excess of the statutory authority of the Food and Agriculture Act of 1965

c. Issue a Preliminary Injunction:

enjoining and restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert with him from taking action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and

MOORER from their homes on the Minter plantation until the hearing and determination of the prayer for permanent relief, and compelling Defendant MINTER, his agents, representatives, attorneys, and all others acting in concert or participation with him to restore to the land any of these Plaintiffs or those similarly situated who have been removed from their homes on the Minter plantation.

d. Issue a Permanent Injunction:

(1) enjoining and restraining Defendants COLLINS, GODFREY and FREEMAN, their agents, representatives, attorneys and all others acting in concert or participation with them from enforcing or permitting the use of the Assignment Regulation filed February 16, 1966 and making any payments thereunder;

(2) enjoining and restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him from taking any action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER and those similarly situated from their homes on the Minter plantation and compelling Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him to restore to the land any of these Plaintiffs or those similarly situated who have been removed from their homes on the Minter plantation;

(3) compelling Defendant MINTER to negotiate leases for the year 1967 with Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER and those similarly situated to live on and work the land on the Minter plantation previously worked by these Plaintiffs upon terms comparable to those negotiated by Defendant MINTER with his other tenants.

e. Enter judgment in favor of Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, HALE and WILLIAMS and those similarly situated against Defendant MINTER

for the sum or sums of money paid by the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture under the Food and Agriculture Act of 1965 to Defendant MINTER, which money would have been paid to or for Plaintiffs and those similarly situated had Defendant MINTER not illegally denied these Plaintiffs and those similarly situated the ability to work the land on the Minter plantation.

f. And grant such other and further relief as may be proper and necessary.

Dated: December 2, 1966

/s/ DONALD A. JELINEK
DONALD A. JELINEK
Lawyers Constitutional
Defense Committee
31½ Franklin Street
Selma, Alabama

ALVIN J. BRONSTEIN
Lawyers Constitutional
Defense Committee
603 North Farish Street
Jackson, Mississippi

Attorneys for Plaintiffs

VERIFICATION

STATE OF ALABAMA
COUNTY OF DALLAS

I, CLEMON BARLOW, of lawful age, first duly sworn upon oath, depose and say:

That I am one of the Plaintiffs in the action herein;

That I have read the annexed Complaint and know the contents thereof; and

That the matters set out in said Complaint are true and correct to the best of my knowledge, information and belief.

/s/ CLEMON BARLOW

Sworn to and subscribed before me
this 1st day of December, 1966.

/s/ JAMES H. SULLIVAN
Notary Public
My Commission expires: June 11, 1968

IN THE UNITED STATES DISTRICT COURT

MOTION FOR A PRELIMINARY INJUNCTION— Filed December 2, 1966

Please take notice that upon the Complaint herein, Plaintiffs will move this Court at a date and time to be determined by the Court for an Order granting Plaintiffs a Preliminary Injunction

> enjoining and restraining Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him from taking any action to remove Plaintiffs BARLOW, S. BLOCTON, W. BLOCTON, BROWN, GILCREST, GREEN and MOORER from their homes on the Minter plantation until the hearing and determination of the prayer for permanent relief and compelling Defendant MINTER, his agents, representatives, attorneys and all others acting in concert or participation with him to restore to the land any of these Plaintiffs or those similarly situated who have been removed from their homes on the Minter plantation.

and for such other and further relief as may seem just and proper.

Date: December 2, 1966

/s/ DONALD A. JELINEK
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603 North Farish Street
Jackson, Mississippi

Attorneys for Plaintiffs

• • • •

IN THE UNITED STATES DISTRICT COURT

ORDER—December 14, 1966

Upon consideration of the motion of the plaintiffs filed herein on December 13, 1966, seeking substitution of the Honorable Charles S. Conley as counsel of record in lieu of those attorneys heretofore designated, it is

ORDERED that said motion be and the same is hereby granted.

Done, this the 14th day of December, 1966.

FRANK M. JOHNSON, JR.
Chief Judge

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS THE COMPLAINT AS TO DEFENDANTS COLLINS, GODFREY AND FREEMAN—Filed February 1, 1967

Defendants B. L. Collins, Horace Godfrey and Orville L. Freeman, by their undersigned attorneys, respectfully move the court to dismiss the complaint as to them, on the grounds that:

I. The court lacks jurisdiction of the subject matter with respect to said defendants in that plaintiffs lack standing to sue.

II. The complaint fails to state a claim upon which relief can be granted against said defendants, since the challenged regulations of the Department of Agriculture are consistent with statutory authority, and are neither arbitrary nor capricious.

III. The action is an unconsented suit against the United States.

IV. The court lacks personal jurisdiction over indispensable parties, defendants Godfrey and Freeman.

The court is respectfully referred to the attached Memorandum In Support of Defendants' Motion To Dismiss The Complaint etc., in support of this motion.

Respectfully submitted,

/s/ BAREFOOT SANDERS
Assistant Attorney General

/s/ BEN HARDEMAN
United States Attorney

/s/ HARLAND F. LEATHERS
/s/ MICHAEL R. LEMOV
Attorneys, Department of Justice

Attorneys for Defendants
Collins, Godfrey and Freeman

[Certificate of Service (Omitted in Printing)]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT AS TO DEFENDANTS COLLINS, GODFREY AND FREEMAN—Filed February 1, 1967

STATEMENT

Plaintiffs in this action, seek a declaratory judgment that certain amended regulations adopted by the Department of Agriculture[1] are invalid and unauthorized by statute. The regulations in question govern assignments by farmers of subsidy payments under the Upland Cot-

[1] 7 C.F.R. 709 *et seq.* "Assignment of Payment", as amended at 31 F.R. 2815, February 17, 1966.

ton Program and other federal agricultural programs. Plaintiffs further seek to enjoin the defendant federal officials from permitting assignments pursuant to the amended regulations or making subsidy payments pursuant to assignments already made.

The relief requested would, in effect, require said defendants to prohibit assignments by tenant farmers to their landlords to secure payment of rent for land used "to finance making a crop," but would not affect identical assignments to secure payment for supplies, equipment, food, clothing, or soil or water conservation practices, etc., also used "to finance making a crop."

Plaintiffs are tenant farmers who allege they sue on behalf of themselves and all others "similarly situated." Defendants are the Secretary of Agriculture, two officials of the Department of Agriculture and plaintiff's landlord.

THE COMPLAINT

Plaintiffs first claim against the defendant federal officials alleges that defendant Orville L. Freeman, as Secretary of Agriculture, is authorized by law to promulgate regulations pursuant to the Food and Agriculture Act of 1965. (Complaint, paragraph 4(c)) The complaint further alleges that Federal subsidy payments to cotton farmers are provided for by the Act; that partial payments may be made in advance and that payments pursuant to the Act may be assigned. (Complaint, paragraphs 5, 6) The complaint further alleges that pursuant to the statute assignments of payments may be made "as security for cash or advances to finance making a crop * * *." It alleges that the Assignment of Payment regulations (7 C.F.R. 709, et seq., as amended) allow assignment of payments as security to finance "payment of cash rent for land used" in the making of a crop (Complaint, paragraph 7) and that plaintiffs were required to enter into such security arrangements by their landlord. (Complaint, paragraph 10)

It is alleged that assignments for cash rent "in no way" finance making a crop; that prior regulations of the Department of Agriculture prohibited assignments as

security for rent; that said prior regulations "evinced the intent of the legislature" and that the amended regulations are "unauthorized by law." (Complaint, paragraphs 6(c), 8)

Plaintiffs second claim, against the defendant J. A. Minter, Jr., only, alleges that said defendant acted to improperly deprive plaintiffs of their right to receive subsidy payments under the Act. Plaintiffs third claim, against the defendant Minter only, alleges that certain of the plaintiffs have illegally been ordered to vacate defendant's premises because of their participation in litigation with respect to the Cotton program and, in the case of Plaintiff W. Blocton, because of his candidacy for A.S.C.S. County Committeeman.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in this action:

Section 103(d)(13) of the Food and Agriculture Act of 1965; 7 U.S.C. Sec. 1444(d)(13):

> The provisions of Subsection 8(g) of the Soil Conservation and Domestic Allotment Act, as amended (relating to assignment of payments), shall also apply to payments under this subsection.

Section 8(g) of the Soil Conservation and Domestic Allotment Act; 16 U.S.C. Sec. 590h(g):

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop, *handling or marketing an agricultural commodity, or performing a conservation practice.* Such assignment shall be signed by the farmer and witnessed by a member of the county committee * * * Such assignment shall be filed with the county committee. Such assignment shall not be made to pay or secure any preexisting indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary or any

disbursing agent if payment to the farmer is made without regard to the existence of any such assignment. *The Secretary shall prescribe such regulations as he determines necessary to carry out the provisions of this subsection.*[2]

7 C.F.R. Sec. 709.2 (as amended at 31 F.R. 2815, February 17, 1966):

A payment which may be made to a farmer (referred to in this part as the "assignor") under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advance to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor; (b) to provide food, clothing, and other necessities required by the assignor, or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm.

ARGUMENT

I

The Court Lacks Jurisdiction Over the Subject Matter of Plaintiffs Claim Against the Defendant Federal Officials in That No Legally Protected Interest of Plaintiffs Has Been Invaded and Plaintiffs Thus Lack Standing to Sue

Plaintiffs' dispute is not properly with the defendants, Collins, Godfrey and Freeman but with their landlord.

---

[2] The italicized language was added by Public Law 89-742, 89th Congress, November 2, 1966.

Defendants Collins, Godfrey and Freeman have not taken any action which directly invades any legally protected interest of the plaintiffs. For a plaintiff to have judicial standing to challenge administrative action it must be demonstrated that a "legally protected interest" is invaded by such administrative action:

> "In a suit in a Federal court by a citizen against a Government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no judicial 'controversy,' without which, under Article III, Section 2, of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a 'recognized' character at 'commonlaw' or a substantive private legally protected interest created by statute * * *." *Associated Industries* v. *Ickes*, 134 F.2d 694, 700 (2d Cir., 1943) cert. granted 319 U.S. 739 vacated as moot 320 U.S. 707.

Unless plaintiffs can demonstrate that some contract or property right has been directly invaded by the challenged regulation, or unless the right to sue is conferred by statute they lack standing to sue:

> "A litigant ordinarily has standing to challenge governmental action of a sort, that, if taken by a private person, would create a right of action cognizable by the courts * * * Or standing may be based on an interest created by the Constitution or a statute * * * But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially." *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 152 (1950), concurring opinion of Frankfurter, J.

See also, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479 (1938); *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *Rural Electrification Adm.* v. *Central Louisiana*

Elec. Co., 354 F.2d 859 (5th Cir., 1966) cert. den., October 11, 1966.

Plaintiffs in this action can demonstrate neither (1) a legally protected interest nor, (2) direct invasion of any interest.

The Assignment of Payment regulations permit a landlord and tenant to agree to an assignment of program benefits as security for the payment of cash rent by the tenant. Whether or not such assignment is requested or agreed to, does not affect plaintiffs' right to participate in the subsidy program in question,[3] or their right to benefits. Such assignments, if made, are the subject of economic bargaining between plaintiffs and their landlord. Clearly, plaintiffs have no commonlaw right to prohibit their landlords from requesting such terms in contracts. Neither may they require defendants to prohibit such contractual arrangements. Nor is there any statutory basis for such prohibition.

In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1939), the Supreme Court held that a litigant has no standing to assert that a Government official had misinterpreted his instructions in requiring a particular clause to be included in a contract:

> "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation." *Perkins* v. *Lukens Steel Co.*, supra, 129.

Unlike *Perkins*, the regulation involved in this action does not *require* the inclusion of a contract term. And the contracts involved in this action are between two private parties not with the United States as in *Perkins*. The *Perkins* decision requires the conclusion that plaintiffs in this action have no legal right to limit arms-length bargaining. See also: *Johnson* v. *Redevelopment Agency*, 317 F.2d 872 (9th Cir., 1963), *cert. denied* 375 U.S. 915, holding that residents of an urban renewal area, who were not parties to a contract between the local renewal agency and the United States, were with-

[3] The Upland Cotton Program, 7 U.S.C. 1341, *et seq.*

out standing to enforce the conditions of the contract; *Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217 (D.C. Cir., 1964), *cert. denied* 379 U.S. 826, holding that a labor organization and individual workers lacked standing to challenge the administrative interpretation of immigration statutes allowing aliens to enter the United States.

In addition to plaintiffs' failure to demonstrate a legally protected interest in this action, they have failed to demonstrate that *any* interest of theirs has been invaded by the action of the defendants. The regulations challenged are permissive and not mandatory. They do not require the parties to leases to agree to assignments as security for the rent. Prior to their amendment the regulations permitted assignments to secure payment for equipment, clothes, fertilizer, etc. The amended regulation adds rent to this list of items. Since it is permissive and not mandatory it "does not represent exercise * * * of regulatory power over private business or employment." *Perkins* v. *Lukens Steel Co., supra*, 128.

Plaintiffs' rights are no way "invaded" since the regulation does not compel them to do anything. As stated by the Supreme Court in *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1922):

> "The State of Massachusetts * * * complains that the Act in question invades the local concerns of the State * * * Probably it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject * * * nor does the statute require the state to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

The gravamen of plaintiffs' complaint is actually that the amended regulation permits another person to obtain an economic advantage over them. Such a complaint is no different than that of the plaintiff-competitors in *Ala-*

bama Power Co. v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939) and similar cases. In neither situation is there standing to sue the Government. As stated by the Court of Appeals for the District of Columbia:

> "The defendants have not undertaken to regulate (plaintiffs) in any way. They have not been ordered to abandon any of their activities or to forego the expansion programs planned by them. They have not been subjected to any obligation or duty. Their sole interest and objective is to eliminate the competition which they fear." *Kansas City Power and Light Company* v. *McKay*, 225 F.2d 924, 928 (D.C. Cir., 1955), *cert. denied* 350 U.S. 884.

Since plaintiffs have failed to demonstrate a *legally protected interest* which has been *invaded* by the action of the defendant federal officials, they lack standing to maintain this action and the complaint should be dismissed as against these defendants.

II

The Regulations of the Department of Agriculture Involved Herein Are Consistent With Statutory Authority and Neither Arbitrary Nor Capricious and May Not Be Invalidated in This Action

The Assignment of Payment regulations, 7 C.F.R. 709, *et seq.*, are duly promulgated and adopted regulations of the Department of Agriculture. As such they are presumed to be valid and the burden of proving their invalidity is on the plaintiffs in this action. *United States* v. *Obermier*, 186 F.2d 243, 247 (2d Cir., 1960), *cert. denied* 340 U.S. 951; *United States* v. *Watkins*, 173 F.2d 599 (2d Cir., 1949), *aff'd* 338 U.S. 537.

> "Regulations having been duly adopted, the burden is on one who questions them to show their invalidity. *Montana Eastern Ltd.* v. *United States*, 9th Cir., 95 F.2d 897. And this burden can be carried only by showing as a minimum that the regulations are inconsistent with the underlying statute or are unrea-

> sonable or inappropriate. *United States* v. *Morehead*, 243 U.S. 607, 37 S. Ct. 458, 61 L. Ed. 926; *Boske* v. *Comingore*, 177 U.S. 459, 20 S.Ct. 701, 44 L. Ed. 846." *United States* v. *Watkins, supra*, 603.

The Court of Appeals for the Fifth Circuit has held that the scope of judicial review of such regulations is limited:

> "We must assume that even if we disagree with this decision of the Commission that these expenditures should be assigned to Account 538, that disagreement would not of itself warrant our setting aside the Commission's determination. 'It is a fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence."' *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112, 67 S.Ct. 133, 91 L. Ed. 103. *Southwestern Electric Power Co.* v. *Federal Power Commission*, 304 F.2d 29, 42 (5th Cir., 1962).

See also: *American Tel. and Tel. Co.* v. *U.S.*, 299 U.S. 232, 236 (1936); *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125, 146 (1938); *Garelick Mfg. Co.* v. *Dillon*, 313 F.2d 899 (D.C. Cir., 1963); *Gray* v. *Powell*, 314 U.S. 402, 411 (1941); Davis, *Administrative Law*, Section 30.10.

The Food and Agriculture Act of 1965 authorizes assignment of benefits in the following language:[4]

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing, as security for cash or advances to *finance making a crop* * * * (Emphasis added.)

The words "to finance making a crop" are not defined in the statute. On its face, the statutory language authorizes assignments as security for any form of cash or

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[4] The text quoted is 16 U.S.C. 590h(g). That section is made applicable to the Upland Cotton Program by 7 U.S.C. 1444(d)(13), Section 402(d)(13) of the Food and Agriculture Act of 1965.

advance which is an element of the process of producing a cotton crop.

The challenged regulation, as amended, defined the words "to finance making a crop" as follows:

> a) To finance the planting, cultivating or harvesting of a crop, including the purchase of equipment required therefor *and the payment of cash rent for land used therefor;* (b) To provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) To finance the carrying out of soil or water conservation practices. (Emphasis added.)

Plaintiffs allege that the italicized words allowing an assignment as security for the payment of rent for land used in "making a crop" are unauthorized by the statute.[5] Yet the statute does not impose any limitation on assignments which finance "making a crop". No aspect of the process of making a crop is expressly excluded. Land, like labor and equipment, is essential to making a crop. The regulations challenged are reasonable and consistent with the statute. See *Cargo Carriers* v. *Snyder*, 104 F. Supp. 258 (D.C.D.C. 1952), affirmed 206 F.2d 488 (D.C. Cir., 1953), holding that the Coast Guard could properly define the statutory term "vessel" to include a tugboat and barge which operated as a unit.[6]

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[5] The complaint apparently demands judgment declaring the entire February 1966 amendment invalid. However, the complaint does not allege that plaintiffs were affected by the balance of the 1966 amendment, modifying Section 709.4, to allow deduction of interest, not in excess of the maximum rate chargeable under state law, in advance. No interest is provided for with respect to the rent or assignments involved herein.

[6] See also, *Hammond* v. *Hull*, 131 F.2d 23, 25 (D.C. Cir., 1942):

> * * * When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interefered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious.

See also, *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 11, 131 (1943):

> * * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administer-

Nor are the regulations, as amended, arbitrary or capricious. The amendment of February 1966 recognized that credit arrangements for the rental of farm land are a widely used and accepted contractual arrangement in modern farming. The amendment has particular applicability to the Upland Cotton Program. The Food and Agriculture Act of 1965 reduced the basic loan rate for cotton from the 1965 level of 29 cents per pound to 21 cents per pound for the 1966 crop and also reduced the acreage which might be planted. 7 U.S.C. 1444(d). This reduction in the value of the cotton crop reduced commensurately the value of cotton as security for rent payments. The amendment thus recognizes an additional form of security for rent and will, in many cases, aid farmers in plaintiffs' position to secure financing where they otherwise might not be able to do so.

In any event, the wisdom of such a regulation is a matter which has been committed to the expertise of the Secretary of Agriculture. The Court should not substitute its judgment for that of the officials who administer the program:

> The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in Board of Trade v. United States, 314 U.S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legis-

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ing the statute must determine it initially, the reviewing court's function is limited. * * *

lative authority and to the Commission for its exercise. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943).

The regulations in question are consistent with the statute and neither arbitrary nor capricious and should not be invalidated by the Court.

III

The Action Is An Unconsented Suit Against the United States

Plaintiffs, in their first claim, seek to set aside a duly promulgated regulation of the Department of Agriculture and compel officers of the United States not to honor assignments made thereunder. With respect to such relief the action is one against the United States regardless of the defendants named:

> "* * * the general rule is that a suit is against the sovereign if 'the judgment sought would extend itself on the public Treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be to 'restrain the Government from acting or to compel it to act.' Larson v. Domestic and Foreign Corp., supra, (337 U.S. 682 (1949) at 704; ex parte N.Y., 256 U.S. 490, 502 (1921). * * *" *Dugan* v. *Rank*, 372 U.S. 609, 620.

The relief demanded against defendants Collins, Godfrey and Freeman would "interfere with the public administration" and "restrain the Government" from implementing a major federal program. Since the regulations in question are fully authorized by the Statute (See Section II, supra) the rule of sovereign immunity bars such a claim:

> "* * * it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel

it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 702 (1949).

Plaintiffs cite no express statutory consent of the United States to the relief sought in this action against the defendant federal officials, and the complaint must therefore be dismissed.

IV

The Court Lacks Personal Jurisdiction Over Indispensable Parties, Defendants Godfrey and Freeman

Defendants Godfrey and Freeman have not been personally served with process in this action within the territorial limits of the State of Alabama as required by Rule 4(f) F.R.C.P. Extra-territorial service of process is available only where "each defendant" is a federal officer, see 28 U.S.C. 1391(e), which is not the case in this action.

Defendants Freeman, Secretary of Agriculture and Godfrey, Administrator of the Agricultural Stabilization and Conversation Service of the Department of Agriculture are indispensable parties in this action since plaintiffs seek to invalidate a departmental regulation and enjoin payment of federal funds pursuant thereto. *Stroud* v. *Benson*, 254 F.2d 448 (4th Cir., 1958); *Lazar* v. *Benson*, 156 F. Supp. 259 (E.D.S.C., 1957).

Furthermore, venue of the action is improper since it may be brought only in the judicial district where all defendants reside. See 28 U.S.C. 1391(b). Defendants Godfrey and Freeman are residents of the District of Columbia. *Stroud* v. *Benson, supra; Ernst* v. *Secretary of Interior*, 244 F.2d 344 (9th Cir., 1957).

Since the court lacks jurisdiction over indispensable parties and since venue is improper, the complaint must be dismissed against the defendant federal officials.

CONCLUSION

Defendants' motion to dismiss the complaint as to defendants Collins, Godfrey and Freeman should be granted.

Respectfully submitted,

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Assistant Attorney General

/s/ BEN HARDEMAN
United States Attorney

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IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS FREEMAN, GODFREY AND COLLINS
—Filed February 20, 1967

Defendant Freeman, Secretary of Agriculture; defendant Godfrey, Administrator of the Agricultural Stabilization and Conservation Service of the Department of Agriculture; and defendant Collins, Executive Director of the Alabama Agricultural Stabilization and Conservation Service, have jointly filed a Motion to Dismiss the complaint in the title cause on several grounds. This Motion to Dismiss necessarily goes only to the First Claim in the complaint (a challenge to the legality of certain Department of Agriculture regulations) since that is the only claim under which relief is sought against these defendants. The Second and Third Claims, which seek relief from Defendant Minter, are discussed in a separate memorandum.

Plaintiffs will show in this memorandum that each of the grounds for dismissal pressed by defendants is unfounded. Three of defendants' grounds are attempts to raise technical procedural rules to avoid a judgment of plaintiffs' challenge on the merits. These procedural claims will be discussed at the end of this memorandum. The only question raised on the merits, that of the statutory authority for the challenged regulations, is the most important question in this case and deserves discussion first.

I.

The Challenged Regulation Is Invalid and Unauthorized By Law in That It Exceeds the Statutory Authority Given to Defendants.

A. *Background*

This case involves the assignment by poor tenant farmers of land diversion payments authorized to be made to them by Section 402(a) of the Food and Agriculture Act of 1965, 7 USC Sec. 1444(d)(13). The Food and Agriculture Act of 1965 is omnibus legislation which, *inter alia*, establishes price support levels and soil diversion payments for various crop programs. Section 1444(d) prescribes price support and diversion payments for the upland cotton program for the 1966 and three subsequent crop years. To be a beneficiary of the program, a farmer must "be a producer on whose farm the acreage planted to the commodity does not exceed the farm acreage allotment for the commodity . . ." (7 USC Sec. 1428(b)) The acreage diversion payments in the case of the production of upland cotton are specifically prescribed by 7 USC Sec. 1444(b)(4) for farmers who divert "a portion of their cotton acreage allotment from the production of cotton to approved conservation practices to the extent prescribed by the Secretary. . ." Thus a farmer, whether a small tenant farmer or a landowner, has a right to receive payments in accord with his diversion of land to approved conservation use.

Diversion payments, like acreage allotments, are administered on the local level by the Agricultural Stabiliza-

tion and Conservation Service (ASCS). 7 USC Secs. 1421(a), 1444(d); 16 USC Sec. 590h(b). The local administrative unit is usually the county. See 16 USC Sec. 590h(b). The county ASC committee is specifically authorized to process and enforce the assignment of diversion payments when assignment is made for certain prescribed purposes. 7 CFR Pt 709. If an assignment is not made for proper purposes and in conformity with the procedure prescribed, the diversion payment is made directly to the producer-assignor. If the assignment is properly made, however, it is recorded with the county committee and the federal agency and the payment is made directly to the assignee to the extent of the assignment.

The crucial issue in this case is the scope of purposes for which assignment of a diversion payment under the upland cotton program may properly be made. In particular, *the issue is whether assignment may be made to secure an obligation to pay rent.* The answer to this question lies in the interpretation of 7 USC Sec. 1444(d)(13) and 16 USC Sec. 590h(g) which together establish a "spendthrift trust" sort of rule which places very strict limits on assignments.

7 USC Sec. 1444(d)(13), a provision under the upland cotton program enacted in 1965, provides that:

> The provisions of section 590h(g) of title 16 (relating to the assignment of payments), shall also apply to payments under this [program].

Turning to the "provisions of 16 USC Sec. 590h(g), we find:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances *to finance making a crop. . .* (Emphasis added.)

The key phrase in this statute, "to finance making a crop", had been carefully defined by the Department of Agriculture in 1965 when Congress adopted the upland cotton program. The Department's regulations under Sec. 590h(g) had since 1955 read:

> . . . To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. *Nothing contained herein shall be construed to authorize an assignment given to secure* the payment of the whole or any part of the purchase price of a farm or *the payment of the whole or any part of a cash or fixed commodity rent for a farm.* 7 C.F.R. Sec. 709.2, promulgated in 20 Fed. Reg. 6511 (1955).

Thus, at the time the upland cotton program was enacted, the issue in this case was crystal clear. Diversion payments could not be assigned to secured (sic) farm rent obligations.

In the spring of 1966, however, the Department of Agriculture made a dramatic about-face. The prohibition of assignments for cash rent was deleted and instead the definition of "making a crop" was expanded to include:

> the payment of cash rent for land used (for planting, cultivating or harvesting) 31 Fed. Reg. 2815 (1966)

This about-face in the regulations has a very substantial adverse impact on a tenant farmer's relationship with his landlord. The tenant's right to a diversion payment is likely to be his sole means of security for borrowing purposes. When that security is taken up by the landlord for rent, then the tenant's borrowing power is destroyed. He has no choice but to turn to the same landlord, who in the normal case conveniently operates a feed and supply store, for his seed fertilizer and necessities to get through the year. Thus the landlord maintains complete financial domination over the tenant. Those tenants who attempt to assert their independence and refuse to make an assignment can be turned off the land as happened to several plaintiffs in this case.

There was absolutely no statutory authority for the Department of Agriculture's dramatic about-face in 1966 from its longstanding interpretation of "making a crop".

This change is contrary to commonly understood definitions of "making a crop". It is contrary to the legislative history of the statutes involved and to the spirit and purpose of those statutes. This 1966 change in the regulation should be struck down as in excess of statutory authority.

B. *A Regulation which Is in Excess of Statutory Authority is Invalid.*

The question herein is whether Congress intended in the enactment of the Food and Agriculture Act of 1965 to authorize the Secretary to promulgate regulations providing for the assignment of diversion payments to secure payment of cash rent for land to be used in producing a crop. Ascertainment of Congressional intent focusses on the question what Congress meant by the phrase "to finance making a crop." Congress used this phrase to limit the Secretary's authorization in the upland cotton program by making 16 USC Sec. 590h(g) applicable to that program. Therefore unless the payment of cash rent for agricultural land is within the Congressional intendment of "making a crop", the Secretary's amendment of the regulation cannot stand.

The Secretary, in administering the upland cotton program, must act within the limits of his statutory authorization. He cannot issue regulations applying the terms of the statute that exceed the limits of his authority. *Miller* v. *United States*, 249 U.S. 435, 440 (1935); *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). The extent of his authority is necessarily a matter for the determination of the court, not of the administrator himself. *Addison* v. *Holly Hill Fruit Co.*, 322 U. S. 607, 616 (1944).

The Secretary's interpretation of statutory language at any time is not conclusive, though of course it has weight in judicial consideration. The weight depends, as the Court by Mr. Justice Frankfurter has said, on the generality or specificity of the statutory authorization:

> The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is

> called, its details. But when Congress wants to give wide discretion it uses broad language. *Addison* v. *Holly Hill Fruit Co., supra* at 616.

Congress has created many agencies invested with broad policy-making functions and imposed upon them such discretionary guides as "the public interest, convenience and necessity" and what is "just and reasonable." See *Federal Radion Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933); *Tagg Brothers & Moorhead* v. *United States*, 280 U.S. 420 (1930); 1 DAVIS, ADMINISTRATIVE LAW Sec. 2.03 (1958). Such agencies are required to hold hearings in specific applications of the statute and to consider public comments in the discharge of their policy-making function. See *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir., 1966); 1 DAVIS, *id.* Sec. 7.01. This close, regular attention to the subject of the regulation is in part the reason for judicial deference to administrative expertise. See, e.g., *NLRB* v. *Hearst Publications*, 322 U.S. 111 (1943).

But neither the Department of Agriculture nor the Commodity Credit Corporation is such an agency. As we shall show *infra*, the statutory term "making a crop" is a technical term of narrow signification. It is not the term which Congress would have chosen to authorize the Secretary to make and revise policy discretionarily on the assignability of price support and diversion payments. The Department of Agriculture does not hold hearings on the question of need for extension of the right of assignment. Nor is the statutory term in question here a phrase of merely common English usage which would be susceptible of many variations in application. Compare *Cargo Carriers* v. *Snyder*, 104 F.2d 258 (D.D. C. 1952), where the court upheld a determination by the Secretary of the Treasury that a peculiar towboat and barge, when used in combination, were a "vessel" for purposes of compliance with safety reuirements administered by the Coast Guard. There the finding of broad Congressional delegation was dictated by the use of ordinary words in relation to the practical safety purposes of the legislation.

If, as we shall show, on the basis of the meaning of the phrase, Congressional adoption of the administrative interpretation, and Congressional intent, the Secretary's amendment is unauthorized, then the court must strike it down.

C. *Definitional Meaning of "Making a Crop"*

The phrase "to make a crop", though it is simple English, may not be dismissed as a colloquial expression of "to grow a crop." The phrase has a considerable history of narrower, technical usage, which appears in the dictionary definitions.

This usage, like that of all words, has of course not been perfectly constant. Originally, in its English usage, the phrase meant to prepare a crop for use or storage at the last stage of development. So, "to make hay" meant to turn cut hay for drying by the sun in the field. *Oxford English Dictionary* M-64 (1908). The judicial construction of the term confirms this usage.

In *Texas & Pac. Ry. Co.* v. *Bayliss*, 62 Tex. 570 (Sup. Tex. 1884), where the court considered the measure of damages for the destruction of growing crops, the court said:

> The meaning of the word *make*, when used in relation to a crop, is as well understood as any other word in our language. It means "produce at maturity."
>
> A growing crop is not *made* but in the process of being made; . . .
>
> To adopt the construction of appellee, we should have to hold the expression "would have made" to be equivalent to the words "had growing upon it", which is quite a different thing, as anyone accustomed to cultivating crops would testify. * * *
>
> . . . The word *make* is hardly so comprehensive in signification as the word 'produce', being ordinarily limited to production at maturity.
>
> Id. at 574 (Emphasis in original.)"

See also *Driver* v. *Maxwell*, 56 Ga. 11 (Sup. Ct. Ga. 1876), where a member of the court stated: "To make, means to

gather and house, to fit it for use or market." *Id.* at 20 (Dissenting opinion).

There is some more recent authority for a somewhat broader usage. The *Dictionary of Agricultural and Allied Terminology*, at 643, gives this definition:

> To plow and fit land, to plant send, to cultivate, to harvest, etc.

Although this usage comprehends an earlier stage in the process of growing the crop, it clearly derives from the other definitions and is likewise limited by its focus on the actual labor and work involved in growing. In all usages, the term deals with the farmer in the field growing his crop, not negotiating for his farm.

The assignment regulations, as originally adopted and as in force at the time of the enactment of the 1965 Act, reflected the last-stated usage of the term "to make a crop." The Secretary apparently adopted the broadest construction which he thought the language permitted. The regulation plainly respects the bounds of the technical usage. It read, as we will recall:

> . . . To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required—therefore; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. 20 Fed. Reg. 6511 (1955)

Both (a) and (b) are necessary functions of the ongoing process of growing the crop.

(a) Planting, cultivating and harvesting of the crop are clearly within the definition. The purchase of equipment is included insofar as it is "required" for planting, cultivating or harvesting.

(b) The provision of necessities for the farmer's family is an expense of labor, which is within the contemplation of the phrase. The family's closeness to the farm during this time, their working together on it and their personal dependence on credit explain the relevance of the provi-

sion of necessities to an assignment to finance making a crop.

(c) The inclusion of "soil and water conservation practices" finds justification in the purposes of the act as a conservation and production—adjustment measure rather than in the language itself. This provision is therefore irrelevant to the validity of the amendment.

The Secretary's 1966 amdnement directly reversed his construction of the statutory language on a major point of substance. Since before the amendment the regulation reflected the broadest possible definition of "making a crop," the amended regulation exceeded the definition.

When statutory language is technical, then the technically authoritative meaning given that language is the best guide to legislative intent. *O'Hara* v. *Luckenbach Steamship Company*, 269 U.S. 364, 371 (1926); *Carter* v. *Liquid Carbonic Pacific Corp.*, 97 F. 2d 1, 3 (9th Cir. 1938). Absent technical significance, words are to be given their ordinary meaning, which may be found by reference to an appropriate dictionary. *Powell* v. *United States*, 60 F. Supp. 433, 439 (E.D. Va. 1945), *affirmed* 152 F. 2d 228 (5th Cir. 1945), *affirmed* 330 U.S. 238 (1947). Reliance on dictionary definition is peculiarly appropriate when the definition reveals a specialized usage in the industry which provides the statutory context.

On the basis of Congressional intent as evidenced by the definitions stated above, therefore, the statute does not authorize the Secretary's assignment regulations amendment.

D. *Congressional Adoption of Administration Construction Excluding Rent.*

It is dispositive of the question of Congressional intent as to the meaning of "making a crop" that at the time of the enactment of the Food and Agricultural Act of 1965 there was in effect a regulation which unequivocally and emphatically expressed the view of the Secretary on the question. The regulation had been in effect for ten years prior to the passage of the Act, and during that time the Secretary's construction unvaryingly had been

that assignments to secure cash rent payments were unauthorized. It follows from a basic principle of statutory construction that Congress recognized, approved and adopted this construction by enacting in another context the language in question.

The principle is that legislators are presumed to know the construction placed upon a statute by its administrators and that reenactment of the statute affirms the administrative construction. Thus in *Wyoming* v. *United States*, 310 F. 2d 566 (10th Cir. 1962), the court said:

> When Congress passed the Resurvey Act of 1908, it must be presumed to have known of the construction which had been placed on the Resurvey Acts of 1903 and 1905 and the effect given to such earlier acts by the Department of the Interior and the practice and procedures followed and carried out by such Department . . . Therefore, when Congress enacted the Resurvey Act of 1908, without substantial change in any relevant part, it manifested its approval and ratification of the administrative construction of the earlier Resurvey Acts by the Department . . . *Id.* at 580.

Accord, *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920). See *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *Cammareno* v. *United States*, 358 U.S. 498 (1959); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

This principle is particularly relevant where, as here, Congress does not bother to repeat statutory language but rather expressly adopts and incorporates another definition by reference. In the Food and Agriculture Act of 1965, instead of authorizing in terms the assignments of payments, Congress tersely made "the provisions of Section 590h(g) of Title 16 . . . apply to payments under this subsection." 7 USC Sec. 1444(d)(13). This cursory treatment evinces rare confidence in the clarity and settled character of statutory "provisions." The use of such an indefinite term as "provisions" to refer to as cryptic a statute as 16 USC Sec. 590h(g) implicitly recognizes that its provisions were spelled out in regulations. Had Congress meant to authorize the Secretary to begin again,

and to give the assignment right in the upland cotton program a life of its own, independent of the history of Section 590h(g), Congress would have spoken in absolute terms. The drafting of Section 1444 (d)(13) therefore establishes a clear Congressional understanding that "making a crop" did not include payment of rent.*

E. *Spirit and Purpose of Assignment Restrictions*

The legislative history of the "making a crop" limitation on the assignment of payments, from its origin in the Soil Conservation and Domestic Allotment Act to its incorporation in the Food and Agriculture Act of 1965, shows that it was used in accord with the established definition and that it reflects a benevolent purpose toward small tenant farmers.

Section 8(g) of the Soil Conservation and Domestic Allotment Act, 16 USC Sec. 590h(g), (to which 7 U.S.C. Sec. 1444(d)(13) refers) was the statutory origin of the phrase "making a crop." The phrase came into the Soil Conservation and Domestic Allotment Act as an amendment by Section 103 of the Agricultural Adjustment Act of 1938. The conference report on this provision states in explanation only that:

> The assignment may be made only as security for cash or advances to finance making a crop. H. Rep. No. 1767, 75th Cong. 3d Sess. 60 (1938).

However, in the bill Section 103 was entitled "TENANT PROVISIONS" and also included a provision (Section 8

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* The reference of "making a crop" is made explicit again in the preparation of the 1965 Act. The conference report, in summarizing the provisions of the bill, states:

> Cotton farmers may assign their direct price support and diversion payments to *private lending agencies* in obtaining *production loans*. Confer. Rep. No. 1123, 89th Cong. 1st Sess. (1965 US Code Cong. & Admin. News 5966). (Emphasis supplied.)

"Production loans" are not loans for rent, and loans for rent are not usually made by private lending agencies. Thus the Congressional discussion surrounding the term "making a crop" evinces a meaning which does not include payment of rent.

(f) of the Soil Conservation and Domestic Allotment Act) prohibiting landlords from increasing their benefits by evicting, or changing their agreements with, tenants and sharecroppers. This Congressional concern for sharecroppers and tenants is carried over in the upland cotton program, which includes a provision requiring "adequate safeguards to protect the interests of tenants and sharecroppers." The problem of tenants and sharecroppers has troubled Congress throughout the agricultural subsidy area. Thus the committee report on a related program states:

> No single problem connected with the proposed soil bank program had caused the committee more concern than that of guaranteeing adequate protection of tenants and sharecroppers under the program.
>
> Conference Report on H.R. 12, Sec. 4 Cong. 2d Sess. 7

This understanding of Congressional intent comports fully with the clear Congressional policy to benefit and protect small tenant farmers and sharecroppers in the subject legislation. Congress, in enacting the assignment restrictions of the 1965 Act, was acting toward poorly educated tenants and sharecroppers with the same intentions that a father has when he inserts a "spend thrift" provision in a trust for his son. By providing a form of security to cotton tenant farmers, these restrictions were intended to benefit directly and primarily the assignor, not the assignee. If tenant farmers, who negotiate with their landlords from a position of inherent weakness, can be compelled to assign away their benefits for rent, no source of security would remain to them to finance purchases of fertilizer, food and other necessities.

The position of the Secretary is apparently that the regulation amendment is justified because it benefits landlord farmers because the costs of farming have increased and the price support loan rate has declined. With a stroke of the pen that authored the regulation amendment, the Secretary has shifted the burden of high costs to from landlord farmers to poor tenant farmers. The Secretary

is privileged to harbor good intention for landlord farmers. He cannot, however, substitute those good intentions for statutory authority and promulgate a regulation contrary to the meaning, intendment and policy of the Act.

II

Defendant's Procedural Grounds for Dismissal Have No Merit

For the foregoing reasons, plaintiffs believe that it is clear on the merits that the challenged assignment regulations are in excess of the Secretary's authority and should be struck down. However, in keeping with an unfortunate tendency on the part of administrative officials to seek to avoid judicial review of their actions on the merits by raising various technical procedural claims defendants have raised the procedural objection that (1) plaintiffs lack standing, (2) the action is an unconsented suit against the United States, and (3) that plaintiffs have failed to properly join indispensable parties. None of these claims has merit in the instant case.

A. *Plaintiffs Have Standing to Bring this Action*

The judicial rules which have evolved on the question of standing are not noted for their clarity or consistency. The standing doctrine has been developed in an attempt to assure that the party bringing a lawsuit is sufficiently and directly harmed to have an adequate interest in vigorously prosecuting his claim.

The harm to plaintiffs caused by the challenged regulations is very real and direct. The regulations are directed specifically to plaintiffs and others similarly situated. The damage to plaintiffs is not speculative or contingent. The regulations have produced economic pressure against plaintiffs which has hampered their farming activities. It has resulted in some cases in plaintiffs being forced off of land which they had farmed for decades. It has enabled landlords to demand assignment of the only substantial liquid asset possessed by plaintiffs and thus has precluded plaintiffs from obtaining credit anywhere except at the landlord's store.

Plaintiffs standing is based on the fact that the challenged regulations interfere with their contract rights *vis-a-vis* their landlords. The courts have recognized the existence of standing in many similar situations where governmental action has interfered with private contractual rights. In *City of Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77 (1958), the Court was presented with a situation where one Parmalee had had a contract for transportation services with various railroads in Chicago. The railroads discontinued the contract and entered into a new contract with Transfer. The City of Chicago then passed an ordinance requiring Transfer to obtain a certificate before operating. Transfer and the railroads successfully challenged the constitutionality of the ordinance in lower courts. Parmalee sought to appeal this decision as an intervening party. The ordinance did not of its own force grant or deny any rights to Parmalee. However, it did have an indirect effect on Parmalee's bargaining rights with the railroads. The Supreme Court held that this indirect effect on private bargaining rights was sufficient to give Parmalee standing.

> "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmalee has a direct and substantial personal interest in the outcome." 357 U.S. at 33.

In *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), the FCC had issued an order denying future licenses to radio stations with certain types of network affiliation contracts. The order was directed at stations, not at the networks. However, the Supreme Court held that the network had standing to challenge the order because it impinged on the network's contractual rights.

> "Appellants standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that . . . the regulations purport to operate to alter and affect adversely appellant's contractual rights

and business relations with station owners." 316 U.S. at 407.

Defendants have attempted to counter these clear authorities supporting plaintiffs standing by citing a group of cases which suggest that a plaintiff must show that his interest being invaded is "of a 'recognized' character at 'common law' or a substantive private legally protected interest created by statute." See Defendants' Memorandum, p. 4-5. Defendants find their principal support for their proposition in a District of Columbia Circuit Court of Appeals decision (*Associated Industries* v *Ickes*, 134 F. 2d 694, 700 (2d Cir. 1943), cert. granted, 319 U.S. 739, vacated as moot, 320 U.S. 707) and a concurring Supreme Court opinion. (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 152 (1950)) Defendants also rely tangentially on a few Supreme Court majority opinions and other Court of Appeals decisions. However, these decisions for the most part antedate 1940 and all are easily distinguishable on their facts from the situation presented in the instant case.* The *City of Chicago* and *Columbia Broadcasting System* cases are much more recent authority, are more closely in point and quite clearly lay down a rule contrary to that which defendants adduce . . .

Moreover, even if defendants were correct in claiming that plaintiffs interest must be of a character recognized at common law, plaintiffs would have standing. The sub-

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* Typical of the cases on which defendants rely is a 5th Circuit decision which is of particular interest to courts in this jurisdiction and therefore is deserving of special comment. This case, *Rural Electrification Administration* v. *Central Louisiana Elec. Co.*, 354 F. 2d 859 (5th Cir. 1966), cert. den., Oct. 11, 1966, like almost all the other authorities relied on by defendants, involved a situation where an unrelated third party was objecting to a government contract or loan. The court stressed that "appellees are not parties to the loan" and that the action complained of was not directed to or against them. 354 F. 2d at 865. In the instant case, plaintiff is no stranger to the challenged regulation. The regulation operates directly and specifically on plaintiffs own rights and on no one else' rights and thus is quite readily distinguishable from *Louisiana Elec.* and similar cases.

stance of plaintiffs claim is that the assignment restrictions in 7 U.S.C. Sec. 1444(d)(13) and 16 U.S.C. Sec. 590h(g) are in the nature of "spendthrift" trust provisions. Following this analogy, the challenged regulations are comparable to a decision by the trustee of a spendthrift trust that he will no longer observe certain aspects of the spendthrift provision. This would quite clearly be a breach of trust and the courts would stand ready to prevent the trustee from carrying it out. Thus, the plaintiffs grievance is one which would have been recognized at common law.

A recognition of plaintiffs standing is not only supported by judicial precedents. It is supported by good sense as well. The courts have long recognized a need to be flexible in fashioning remedies to deal with agency action in excess of statutory authority.

The instant case squarely represents a situation where a remedy must be fashioned to avoid defeating the Congressional purpose. The assignment restrictions set forth in 7 U.S.C. Sec. 1444(d)(13) were intended to protect the interests of poorly educated sharecroppers and tenants who might fritter their subsidies away on ill-advised assignments.* This proceeding offers the only possible opportunity for this sharecropper-tenant group to preserve its rights under 7 U.S.C. Sec. 1444(d)(13). No other procedures are available for review of the Secretary's decision and no further action by the Secretary can be awaited for challenge. There is no other party who is in a better position to challenge these regulations. This

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* "The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902.

* * * *

"Whether or not the Congress intended judicial enforcement of a particular statutory command is not conclusively answered by the absence of any specific statutory remedy. *The courts have always been able to fashion remedies to prohibit agency action in violation of a statutory requirement, if a failure of enforcement would occasion a defeat of the apparent Congressional purpose." Deering Millieken, Inc.* v. *Johnston*, 295 F. 2d 856, 861-63 (4th Cir. 1965) (Emphasis added.)

See *Leedom* v. *Kyne*, 358 U.S. 184, 190-91 (1958).

sort of situation where no other remedy is available presents the strongest possible case for granting review. See *Leedom* v. *Kyne, supra; Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (D.C. Cir. 1965).

B. *This is not an Unconsented Suit Against the United States*

In claiming that the doctrine of sovereign immunity bars this action, defendants rely on the "general rule" stated in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This general rule is, of course, that a suit seeking official action by government officers is barred without the consent of the government.

Defendants concede this general rule and agree that *Larson* is the leading case on the subject. Plaintiffs direct this court's attention, however, to that fact that the *Larson* case expressly recognizes a longstanding exception to this general rule.

It has been universally recognized since *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912) that a suit challenging action by an official in excess of his statutory authority is not a suit against the sovereign. The formulation of this exception in *Larson* was as follows:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . (W)here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. at 689-90.

As has repeatedly been pointed out, the gravamen of plaintiffs' challenge is that the Secretary of Agriculture has acted in excess of his authority. This case therefore falls squarely within this exception the general rule.

Moreover, this suit is authorized by Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. Sec. 1009, which entitles persons suffering legal wrong or adversely affected by agency action to judicial review of that action in any court of competent jurisdiction. This action is clearly within the scope of Section 10 of the APA. Unless section 10 is to be rendered meaningless, it must be interpreted as a waiver of sovereign immunity to the extent that immunity would preclude this action. See *Adams* v. *Witner*, 271 F. 2d 29, 34-35 (9th Cir. 1958).

C. *There Is No Lack of Jurisdiction over Indispensable Parties*

Prior to 1962 the doctrine of indispensable parties created no end of difficulty for litigants and the courts. It gave rise to a mass of conflicting decisions that could not be reconciled and it virtually forced litigants to concentrate all suits against government officials in the District of Columbia where high ranking officials were subject to personal service.

In order to alter this rule, which was felt to be "contrary to the sound and equitable administration of justice," Congress in 1962 enacted a special statutory provision permitting suit against government officials to be brought anywhere in the United States. See S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), in U.S. Code Cong. & Ad. News 2784, 2786 (1962). This special provision altered venue rules to permit such suit and provided for service of process on the defendant government officials by certified mail outside the territorial limits of the state where suit was brought. See 28 U.S.C. Sec. 1391(a).

Everyone had thought that the troublesome doctrine of indispensable parties had been laid to rest. See Davis, Administrative Law Sec. 27.08 (Pocket part 1965). However, the government is now trying to resurrect the doctrine by reading 28 U.S.C. Sec. 1391(e) narrowly so as not to include an action where government officials are joined with non-government persons as defendants.

There is nothing in the legislative history or purpose of 28 U.S.C. Sec. 1391(e) which suggests that it was not

meant to cover such action. On the contrary, the provision was meant to provide judicial remedies for the average citizen close at home where it will be less expensive and where judges will be more familiar with the plaintiffs problems. See S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), in U.S. Code Cong. & Ad. News 2784 (1962). Of course, Sec. 1391(e) applies only to government officials; normal service and venue requirements must be met with regard to a non-government defendant. But with regard to government officials, the burdens of defending litigation out of state are no greater than where they are sued alone.

Defendants attempt to justify their narrow reading of Sec. 1391(e) by pointing to the part that the special remedial statute covers situations where "each defendant" is a government official. There are two meanings which may be given to this "each defendant" phrase. It could be read as defendants suggest, or it could more logically be read to mean only that the special Sec. 1391(e) rules cannot be extended to non-government persons, i.e., only "each defendant" who is a government official is covered by the statute. Under this more logical interpretation, an action which joins government officials and non-government persons would have to satisfy service and venue requirements of Sec. 1391(a) with regard to each government defendant *and* normal service and venue requirements with regard to non-government persons. In this case all such requirements are satisfied.

It seems sensible to interpret a statute such as Sec. 1391(e), which is designed to eliminate an absurd and technical procedural doctrine, in the manner which will best accomplish that purpose. Since there is no logical reason why a joinder of government and non-government officials should defeat the application of Sec. 1391(e) the broader reading of the "each defendant" test should be adopted.

However, even if the narrow reading of Sec. 1391(e) suggested by defendants is adopted there is no need for this action to be dismissed. It is respectfully requested that the court sever the First Claim, which is the only

claim against government officials, and proceed with this claim separately. Such severance is clearly authorized by Rule 21 of the Federal Rules of Civil Procedure. This severance would enable the application of Sec. 1391(e) even under defendants narrow reading.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Motion to Dismiss of Defendants Freeman, Godfrey and Collins be denied in its entirety.

Respectfully submitted,

/s/ Charles S. Conley
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Of counsel:

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435 West 116th Street
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(The foregoing instrument carries proper Certificate of Service which is not copied here.)

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IN THE UNITED STATES DISTRICT COURT

CLEMON BARLOW, ET AL., PLAINTIFFS

v.

J. A. MINTER, JR., doing business as J. A. Minter and Son; B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture, DEFENDANTS

ORDER—February 21, 1967

This cause is now submitted upon the motion of the defendant J. A. Minter, Jr., doing business as J. A. Minter and Son, said motion having been filed herein on December 21, 1966, and the motion of the defendants B. L. Collins, Horace Godfrey and Orville L. Freeman, sued in the capacities set forth in the caption of this order, said motion having been filed herein on February 1, 1967. In each of the motions the defendants seek dismissal of the complaint.

Plaintiffs in this action seek a declaratory judgment that certain amended regulations adopted by the Department of Agriculture[1] are invalid and unauthorized by statute. The regulations in question govern assignments by farmers of subsidy payments under the Upland Cotton Program and other federal agricultural programs. Plaintiffs further seek to enjoin the defendant federal officials from permitting assignments pursuant to the amended regulations or making subsidy payments pursuant to assignments already made. Plaintiffs are tenant farmers, who allege they sue on behalf of themselves and others similarly situated. The defendants are the Secretary of Agriculture, two officials of the Department of Agricul-

[1] 7 C.F.R. 709 et seq. "Assignment of Payment", as amended at 31 F.R. 2815, February 17, 1966.

ture and the plaintiffs' landlord. More specifically, the plaintiffs in their first claim, which is against the defendant federal officials, assert that Orville L. Freeman as Secretary of Agriculture is authorized to promulgate regulations pursuant to the Food and Agriculture Act of 1965; that subsidy payments to cotton farmers are provided for by the Act, that partial payments may be made in advance, and that payments made pursuant to the Act may be assigned. Plaintiffs further assert, in their first claim, that assignments of payments may be made "as security for cash or advances to finance making a crop . . . ." Plaintiffs contend that the regulations allow assignment of payments as security to finance "payment of cash rent for land used" in the making of a crop and that plaintiffs were required to enter into such arrangements by their landlord. Plaintiffs ask this Court to declare that the assignments for cash rent do not finance making a crop; that the amended regulations are unauthorized by law, and that the defendant federal officials should be enjoined from putting said regulations into force and effect.

Plaintiffs' second claim against the landlord, J. A. Minter, Jr., alleges that the said defendant acted to improperly deprive plaintiffs of their right to receive subsidy payments under the Act. Plaintiffs in their third claim, which is also against Minter only, contend that some of the plaintiffs have been illegally ordered to vacate defendant's premises because of their participation in litigation with respect to the cotton program, and in the case of plaintiff W. Blocton, because of his candidacy for "A.S.C.S. County Committeeman."

It is apparent to this Court that, as to claims two and three, which are against Minter only, this Court has jurisdiction, and that as to these two claims, which cannot be determined without affording the plaintiffs and the defendant Minter an opportunity to present their testimony, the defendant Minter's motion to dismiss must be denied and the case, as to claims two and three, must proceed to a hearing.

As to the motion of the defendant federal officials, this Court concludes that their motion to dismiss is well taken.

These defendants have not taken any action which directly invades any legally protected interest of the plaintiffs. For plaintiffs to have jurisdictional standing to challenge administrative action, it must be demonstrated that a "legally protected interest" is invaded by such administrative action. *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943); *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123. Here, it affirmatively appears from plaintiffs' first claim that they have no legally protected interest and, further, that there has been no direct invasion of any such interest. The regulations pertaining to assignments permit a landlord and tenant to agree to an assignment of benefits under the program as security for the payment of cash rent by the tenant to the landlord. Whether such assignment is requested by the landlord or agreed to by the tenant does not affect plaintiffs' right to participate in the subsidy program and does not affect plaintiffs' right to benefits under the program.[2] Such assignments, if made, are strictly between the plaintiffs and their landlord. Plaintiffs have no legal right to prohibit their landlord from requesting such, and plaintiffs may not require these federal official defendants to prohibit such contractual arrangements. The regulations challenged are permissive and not mandatory. They do not represent the exercise of regulatory power over private business or employment. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. See also *Massachusetts* v. *Mellon*, 262 U. S. 447. For these reasons, plaintiffs lack standing to maintain this action against these governmental officials.

In addition, it affirmatively appears from the complaint, the statute involved, and the assignment of payment regulations (7 C.F.R. 709 et seq.) that the regulations are consistent with statutory authority and are neither arbitrary nor capricious. In such instances, regulations are presumed to be valid. *United States* v. *Obermier*, 186 F. 2d 243 (2d Cir. 1960); *United States* v. *Watkins*, 173 F. 2d 599 (2d Cir. 1949), aff'd 338 U. S. 537.

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[2] The Upland Cotton Program, 7 U.S.C., Section 1341, et seq.

Under the circumstances herein presented, the scope of judicial review of such regulations is limited. The United States Court of Appeals for the Fifth Circuit in *Southwestern Electric Power Co.* v. *Federal Power Commission*, 304 F. 2d 29 (5th Cir. 1962), declared such principle as follows:

> We must assume that even if we disagree with this decision of the Commission that these expenditures should be assigned to Account 538, that disagreement would not of itself warrant our setting aside the Commission's determination. "It is a fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 112, 67 S. Ct. 133, 91 L. Ed. 103.

On this first point, plaintiffs first claim is patentably insufficient. The Food and Agriculture Act of 1965 specifically authorizes assignments by farmers to "finance making a crop." The challenged regulation as amended defines the words "to finance making a crop" as including "the payment of cash rent for land used therefor." The conclusion is inescapable that such regulations are reasonable and consistent with the statute; this Court finds that they are as a matter of law. Likewise, this Court finds that the regulations as amended are not arbitrary or capricious. The wisdom of such a regulation is a matter which has been committed to the expertise of the Secretary of Agriculture. A court cannot substitute its judgment for that of the officials who administer the program:

> The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 538,

> is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224 (1943).

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that the motion to dismiss filed hereby the defendant J. A. Minter, Jr., on December 21, 1966, be and the same is hereby denied. It is further ORDERED that this cause, as between the plaintiffs and the defendant Minter on claims two and three, proceed to pretrial as scheduled for Thursday, February 23, 1967, at 9:30 a.m.

It is the further ORDER, JUDGMENT and DECREE of this Court that the motion to dismiss filed herein on February 1, 1967, by the defendants Collins, Godfrey and Freeman, each in his official capacity as above indicated, be and the same is hereby granted.

Done, this the 21st day of February, 1967.

/s/ Frank M. Johnson, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT

CLEMON BARLOW, ET AL., PLAINTIFFS

vs.

J. A. MINTER, JR., doing business as
J. A. MINTER AND SON

ORDER—February 23, 1967

This Court, by order made and entered herein on February 21, 1967, granted the motion of the defendants B. L. Collins, Horace Godfrey and Orville L. Freeman, all officials of the United States Department of Agriculture, to dismiss this action as to each of them. A formal order was entered on said date dismissing the case as to all defendants except the defendant J. A. Minter, Jr. Thus, the case, under its present posture, is between the plaintiffs, all of Dallas County, Alabama, and a defendant also of Dallas County, Alabama. Venue, therefore, is proper only in the Northern Division of the Southern District of Alabama, the division and district wherein Dallas County lies. Section 1391, Title 28, United States Code. This Court is of the opinion that, instead of the dismissal of this cause, the cause should be transferred to the division and district wherein venue is proper.

In the event this Court was in error in dismissing the cause as to the federal officials, the pleadings and briefs filed by the parties with this Court make it clear that it would have been appropriate for the case to have been transferred, for the convenience of the parties and witnesses and in the interest of justice, to the Northern Division of the Southern District of Alabama; in such an event said transfer would have been pursuant to Section 1404(a), Title 28, United States Code.

In accordance with the foregoing, it is the ORDER, JUDGMENT and DECREE of this Court that this cause be and the same is hereby transferred, pursuant to the provisions of Section 1391, Title 28, United States Code, to the Northern Division of the Southern District of Alabama for all further proceedings.

The Clerk of this Court is ORDERED and DIRECTED to forward the entire file in this cause, together with a copy of this order, to the Clerk of the United States District Court for the Southern District of Alabama at Mobile, Alabama.

Done, this the 23rd day of February, 1967.

/s/ Frank M. Johnson, Jr.
Chief Judge

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

* * * *

MOTION FOR CLARIFICATION OF ORDER—
Filed April 14, 1967

Plaintiffs respectfully move that the Court, nunc pro tunc, expressly determine (1) that its Order of February 21, 1967, in the titled action, which dismissed the action as to defendants Freeman, Godfrey, and Collins, was intended to provide for entry of final judgment, and (2) that there is no just reason for delay in entering such judgment; all as provided in Rule 54(b), Federal Rules of Civil Procedure.

A proposed order is attached hereto, as is a supporting memorandum of law.

Respectfully submitted,

/s/ CHARLES S. CONLEY
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Montgomery, Alabama
Attorney for Plaintiffs

[Certificate of Service (Omitted in Printing)]

MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION OF ORDER—Filed April 14, 1967

In its Order of February 21, 1967, the Court provided that "It is the further ORDER, JUDGMENT AND DECREE of this Court that the motion to dismiss filed herein on February 1, 1967, by the defendants Collins, Godfrey and Freeman, each in his official capacity as above indicated, be and the same is hereby granted." It was plaintiffs' understanding that this Order was intended to act as a final judgment as to these three defendants. The Court's subsequent Order of February 23, 1967, which treated these defendants as no longer being parties to the action, confirmed plaintiffs' understanding in this regard.

In these circumstances—*i.e.*, where a separable claim was dismissed against separate defendants—the Order of the Court clearly would have been an appealable final judgment under the traditional rules governing appealability in the federal courts and under the original version of the Federal Rules of Civil Procedure. *United States* v. *River Rouge Co.*, 269 U. S. 411 (1926); *Republic of China* v. *American Express Co.*, 190 F.2d 334, 335-36 (2d Cir. 1951); 6 Moore, Federal Practice at 162-65 (discussing original version of Rule 54(b)). However, as amended in 1946 and again in 1961, Rule 54(b) of the Federal Rules has made it doubtful whether this Order is an appealable final judgment unless and until the trial judge expressly determines that there is no just reason for delay in entering final judgment and expressly directs such entry of judgment. If such express determination and direction are not made, the order may be deemed to be non-final until all other aspects of the action against other defendants are completed. See *Cook* v. *Eizeman*, 312 F.2d 134, 136-37 (5th Cir. 1963); *Ronel Corp.* v. *Anchor Lock of Florida, Inc.*, 312 F.2d 207, 208 (5th Cir. 1963); *Reed* v. *National Old Line Ins. Co.*, 239 F.2d 594, 596 (5th Cir. 1956); *Republic of China* v. *American Express Co., supra*, at 338-39. The appropriate procedure for a party wishing to obtain entry of final judgment is to move the court for an express de-

termination and direction as provided in Rule 54(b). *Reed* v. *National Old Line Ins. Co., supra,* at 596.

There is no doubt that it is appropriate for the Court to determine that there is no reason for delay in entering final judgment regarding the Order of February 21, 1967. The amendments to Rule 54(b) were not intended as a rejection of the prior rule but only as a means of giving the courts discretion to temper the harshness of the rule in borderline cases. See Advisory Committee Note to 1946 Amendment in 6 Moore, Federal Practice at 10-12. The Order of February 21, 1967 operated as a final and complete determination of plaintiffs' First Claim and totally ended the action with regard to defendants Collins, Godfrey and Freeman. The future course of plaintiffs' other claims against defendant Minter cannot in any way affect the status or proper outcome of the claim against defendants Collins, Godfrey and Freeman. This is the clearest possible case for determining and directing entry of judgment without delay. See 6 Moore, Federal Practice at 226. *Cf. Shippers Pre-Cooling Service* v. *Macks,* 181 F.2d 510, 514 (5th Cir. 1950), *cert. denied,* 340 U. S. 816 (1950).

/s/ CHARLES S. CONLEY
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IN UNITED STATES DISTRICT COURT

BARLOW, ET AL., PLAINTIFFS

v.

MINTER, ET AL.

ORDER, DETERMINATION AND DIRECTION—
Filed April 14, 1967

Plaintiffs' Motion for Clarification of Order having properly come before the Court, it is hereby ordered, determined and directed, nunc pro tunc, that insofar as the Order of February 21, 1967 in the title cause dismissed the action as to defendants Collins, Godfrey, and Freeman,

(1) there is no just reason for delay in entry of final judgment, and
(2) the entry of final judgment in accordance with said Order of February 21, 1967, is directed as provided for in Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: , 1967.

FRANK M. JOHNSON, JR.
Chief Judge

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 22, 1967

NOTICE is hereby given that CLEMON BARLOW, SINNIE BLOCTON, WALTER BLOCTON, ARTHUR BROWN, WILLIE GILCHREST, ELIJAH GREEN, OTIS HALE, WILL MOORER and WILL WILLIAMS, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from that part of the Order granting the Motion to Dismiss of Defendants COLLINS, GODFREY, and FREEMAN, entered in this action on February 21st, 1967.

/s/ CHARLES S. CONLEY
Attorney for Appellants
315 South Bainbridge
Montgomery, Alabama

DATED: Apr. 22, 1967

[Certificate of Service (Omitted in Printing)]

MEMO: $250.00 CASH DEPOSITED IN REGISTRY OF COURT BY PLAINTIFFS IN LIEU OF APPEAL BOND, AS CASH BOND ON APPEAL.

WILLIAM J. O'CONNOR
Clerk

[STIPULATION AS TO RECORD ON APPEAL—Filed May 19, 1967 (Omitted in Printing)]

[Certificate of Printer Preparing Record (Omitted in Printing)]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24886

CLEMON BARLOW, ET AL.

versus

COLLINS, GODFREY & FREEMAN

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 24, 1968

On this day this cause was called, and after argument by Donald A. Jelinek, Esq., for appellants, and Norman Knopf, Atty., Department of Justice, for appellees, was submitted to the Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24886

CLEMON BARLOW, ET AL., APPELLANTS

versus

B. L. COLLINS, State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture, APPELLEES

Appeal from the United States District Court for the Middle District of Alabama

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge

OPINION—July 16, 1968

DYER, Circuit Judge: Appellants, tenant farmers receiving benefits under the Food and Agriculture Act of 1965, 7 U.S.C.A. § 1444, appeal from the District Court's decree granting the motion of defendant-appellees Collins, Godfrey and Freeman to dismiss appellant's complaint. The District Court held that appellants did not have standing to challenge an amendment to regulations issued by the Secretary of Agriculture defining permissible assignments by tenant farmers of land diversion payments made to them under the Act. We agree and affirm.

The assignment of diversion payments is governed by the provisions of 16 U.S.C.A. § 590h(g). 7 U.S.C.A. § 144(d)(13). At the time the regulation in question was amended section 590h(g) provided, in pertinent part, that a farmer could assign his payments "as security for cash or advances to finance making a crop." From 1938 to 1966 the Secretary of Agriculture's policy and regulations excluded from the term "making a crop" cash or commodity rent for a farm. 20 Fed. Reg. 6511 (1955). In February, 1966, the regulation was amended to allow a tenant to assign his payments to secure rent for his farm. 31 Fed. Reg. 2815 (Feb. 17, 1966). Appellants' complaint asserts that they "are suffering irreparable injury" because, under the amended regulation, they "were each year required [by their landlord] to execute a rent note as security for the cash rent of this land" and thus were deprived of the bargaining power the payment had given with various merchants and suppliers in previous years. They argue that the regulation in its present form violates the intent of Congress and constitutes illegal action by the Secretary.

In the case of *REA* v. *Central La. Elec. Co.*, 5 Cir. 1966, 354 F.2d 859, cert. denied, 385 U.S. 815, this Court set forth specific criteria for determining whether appellants have standing to challenge an administrative regulation.[1] These criteria are based upon and designed to implement the basic premise of section 10 (a) of the

[1] The Court stated the criteria in the form of four questions:

1. Does this case raise anything more than "mere economic competition made possible by governmental action"?

2. If not, has Congress, expressly or by implication, given [plaintiff-] appellees standing to sue under the terms of the Rural Electrification Act of 1936, 49 Stat. 1363, 7 U.S.C.A. § 901, et seq.?

3. Has Congress, expressly or by implication, conferred jurisdiction on the Courts to review the granting or denial of a proposed REA loan?

In view of the effort to invoke Amendment 5 of the Constitution, we add a fourth question:

Have appellees shown any legally protected property right to be free of competition from the prospective borrower?

REA v. *Central La. Elec. Co.*, *supra* at 863.

Administration Procedure Act, 5 U.S.C.A. § 702.[2] Thus, in the absence of an express or implied statutory grant of standing, mere economic harm to an appellant "made possible by government action (even if allegedly illegal) does not give standing to sue to restrain such action." *REA* v. *Central La. Elec. Co., supra* at 863, and authorities cited therein.

When the Fifth Amendment is invoked, as it is here, it must be determined whether appellants have established "any legally protected property right," *id., i.e.,* any legal right to be restrained from assigning their diversion payments to their landlord. See *Braude* v. *Wirtz*, 9 Cir. 1965, 350 F.2d 702, 707; *Pennsylvania R.R.* v. *Dillon*, D.C. Cir. 1964, 335 F.2d 292, 294, *cert. denied sub nom., American-Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945. Appellants contend that they have such a right because the statute in question was enacted for their benefit. However, a policy of protecting a class of persons does not, without more, grant a legal right to those persons to enforce the policy. *REA* v. *Northern States Power Co.*, 8 Cir. 1967, 373 F.2d 686, 695. Furthermore, "allegations of a legally protected right is a *constitutional predicate of standing* to attack governmental action." *Pennsylvania R.R.* v. *Dillon, supra* at 294. (Emphasis added.) We have found no such allegation in appellants' complaint.

Here, as in *REA* v. *Central La. Elec. Co.*, a long standing administrative policy has been reversed. However, there is nothing in this record to show a statute or contract between the government and appellants granting them a property right in being restrained from assigning their payments to their landlord. Appellants attempt to show that the statutory phrase "making a crop" precludes assignment for land rent because it is a technical phrase meaning "to prepare a crop for use or storage at the

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[2] That section reads:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is emtitled to judicial review thereof.

last stage of development." Appellants' Brief, p. 24 (citing Oxford English Dictionary M-64 (1908)). We are unwilling to accept such technical niceties, especially in light of a recent amendment to the statute which added, after the phrase "to finance making a crop" the words "handling or marketing an agricultural commodity, or performing a conservation practice." 16 U.S.C.A. § 590h (g) (Supp. 1967).[3] The substance of the amendment clearly evinces a Congressional willingness to expand areas of permissible assignment. Furthermore, over the years the Secretary has amended the assignment regulation to allow assignment as security for such items as food and clothing for the tenant and his famliy when in the Secretary's expert judgment practical considerations have warranted such changes. Appellants challenge only the farm rental portion of the regulation and have failed to show any statutory or contractual right to challenge that provision of the regulation allowing them to assign for rent on the land upon which their crops are grown while taking advantage of the same regulation to assign for food, clothing, etc. to be used while that crop is growing.

Appellants' final argument, that by the adoption of 16 U.S.C.A. § 590h (g) as part of the Food and Agriculture Act of 1965, Congress approved and adopted the administrative construction of that statute so that the regulation cannot now be changed by administrative action, is totally without merit. The regulation was amended in February, 1966. In November, 1966, some ten months later, Congress reconsidered and amended section 590h(g). Thus, if any administrative construction of the statute could be said to have been approved by Congress, it would be the interpretation then in effect, *i.e.*, that diversion payments *may* be assigned as security for farm rent.

The remaining criteria set forth in *REA* v. *Central La. Elec. Co.*, *supra* may be summarized as follows: Have appellants shown that the case presents more than mere

[3] The legislative history sheds no light on the reasons for this amendent. See 3 U.S. Code Cong. & Admin. News 3819-3821 (1966).

economic harm made possible by government action; and, if not, that Congress expressly or impliedly in the Act gave them standing to challenge the Secretary's action, or that it gave the Courts jurisdiction to review that action. Without reiterating the facts developed above, appellants have shown only that their landlord has, under the amended regulation, demanded that they assign their diversion payments over to him as security for the rent of the farmland, and that this has deprived them of economic bargaining power. This is nothing more than an economic consequence permitted, but not required, by government action. Appellants have not shown us, nor have we found, any provision of the Food and Agriculture Act of 1965 [4] which either expressly or impliedly gives appellants standing to challenge this administrative regulation or gives the Courts authority to review such administrative action. To the contrary, the Act is replete with references to the Secretary's power to implement its provisions and evinces Congressional confidence in and reliance on the Secretary's expertise. As we concluded in *REA* v. *Central La. Elec. Co.*, *supra* at 865, this case is one where however outrageous or unfair appellants consider the effects of this regulation, their remedy lies not in the Courts but in Congress.

AFFIRMED.

TUTTLE, Circuit Judge, DISSENTING:

With deference I dissent from the opinion of the court. The federal statute which provides for the payment of these cash benefits to tenants and sharecroppers provides expressly that "in carrying out the provisions of this section, the Secretary shall, as far as practicable, protect the interests of tenants and sharecroppers." 16 U.S.C.A. § 590(h)(b). The provision which authorizes the assignment by a tenant is limited by the terms of the statute

[4] The provisions of this Act are to be found in 7 U.S.C.A. §§ 608c, 1301, 1314b, 1332-1335, 1339, 1339a, 1339c, 1340, 1346, 1348, 1350, 1353, 1374, 1379b-i, 1427, 1444, 1445a, 1782; 16 U.S.C.A. § 590p.

to assignments "as security for cash or advances to finance making a crop." The authority of the Secretary to issue regulations cannot authorize the issuing of a regulation that permits an assignment for something other than "as security for cash or advances to finance making a crop." It is perfectly plain to me that the Secretary, for thirty years, correctly construed the language of that section to prohibit an assignment by a tenant for rent for the land upon which he would then undertake to "make a crop." It seems equally clear to me that the new regulation which authorizes an assignment as security for the payment of rent of the land goes beyond the statutory authorization because it is not an assignment as security for either "cash or an advance," nor, in my opinion, is it an assignment "to finance making a crop." The making of a crop is something that takes place on the land once acquired. I would construe this language as a matter of law as to exclude the cost of obtaining the land upon which the crop is to be made.

I would have no difficulty in concluding that the authorization under this statute to a tenant or sharecropper to make an assignment for the purpose of obtaining seed and fertilizer necessary to make a crop is a special benefit conferred on him by Congress, particularly in light of the express concern demonstrated by Congress by including the language quoted above in subparagraph (b) of the Act. Nor would I have any difficulty in understanding the special benefit which Congress meant to confer upon a tenant by combining an *authorization* to make a limited assignment for the "making of a crop," with a clearly implied *denial* of the right to make the assignment for the payment of rent for the purpose of acquiring the land upon which he was to operate. This meets the test of standing to sue. I would base this conclusion on what this court has said in Rural Electrification Administration v. Central Louisiana Electric Co., 5 Cir., 354 F. 2d 859, where, at page 863, the court discussed the question of standing. It suggested that standing to sue would be found if Congress "expressly or by implication [has] given [the parties] standing to sue under the terms of the" particular statute involved. I

think the right given to the tenants in this statute to have the privilege of making assignments for the cash and other advances used in making a crop, but restricting their right to assign for any other purpose, is a right that is peculiar to such tenants as a class and for their special benefit. I, therefore, think that the Congress has impliedly granted them standing to sue. Moreover, I think the reasoning of the Supreme Court, in its opinion in Abbotts Laboratories v. Gardner, makes it clear that where there is no other way to obtain judicial review of administrative action that infringes a right granted by Congress, there is nothing in the Administrative Procedure Act that would prohibit judicial review of such administrative action.

I conclude, therefore, both that there was standing to sue, and that, on the merits, the Secretary's regulation broadening the language of the statute, as I view it, to include the making of an assignment for rents to landlords was invalid as going beyond the statute.

I, therefore, respectfully dissent from the opinion of the Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24886

D. C. Docket No. CA 4482-67

CLEMON BARLOW, ET AL., APPELLANTS

versus

B. L. COLLINS, State Executive Director of the Alabama Agricultural Stabilization and Conservation Service; HORACE GODFREY, Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, Secretary of the United States Department of Agriculture, APPELLEES

Appeal from the United States District Court for the Middle District of Alabama

Before TUTTLE and DYER, Circuit Judges, and MEHRTENS, District Judge

JUDGMENT—July 16, 1968

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Clemon Barlow, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

TUTTLE, Circuit Judge, dissents.

Issued as Mandate: August 7, 1968

[Clerk's Certificate (Omitted in Printing)]

SUPREME COURT OF THE UNITED STATES

No. 1271 Misc., October Term, 1968

CLEMON BARLOW, ET AL., PETITIONERS

v.

B. L. COLLINS, ETC., ET AL.

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 16, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the Appellate docket as No. 1535 and placed on the summary calendar.

And it is further ordered that the culy certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357059 49